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No.

IN THE

Supreme Court of the United States

October Term, 1982

ANDRE FRANKS,

Petitioner

v.

NATIONAL RAILROAD PASSENGER CORPORATION,
a/k/a AMTRAK

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTION PRESENTED

Is it prejudicial error for the court to refuse to charge the jury on the provisions of the Federal Employers' Liability Act and the law applicable thereto in a case brought under the Act?

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Section 1 (45 U. S. C. § 51) 3

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28 U. S. C. § 1254(1) 2

Other Authority:

Devit and Blackman, 3 *Federal Jury Practice and Instructions*, 3rd Ed., § 94.01 et seq. 9

OPINIONS BELOW

There were no opinions delivered in the courts below with the exception of the Memorandum-Order of the United States District Court for the Eastern District of Pennsylvania denying plaintiff's Motion for New Trial. This Order is not reported and appears as Appendix A.

The Judgment-Order of the United States District Court for the Eastern District of Pennsylvania appears as Appendix B. The Judgment-Order of the United States Court of Appeals for the Third Circuit appears as Appendix C, and the Order of the Court of Appeals denying the Petition for Rehearing appears as Appendix D. These Orders are not reported.

JURISDICTION

The Judgment-Order of the United States Court of Appeals for the Third Circuit was dated and entered June 15, 1982 (Appendix C). The Petition for Rehearing was denied by Order dated July 12, 1982 (Appendix D).

The jurisdiction of the United States Supreme Court is invoked under 28 U. S. C. 1254 (1) (1966).

The basis for federal jurisdiction in the District Court was the Federal Employers' Liability Act. 45 U. S. C. 56.

STATUTE INVOLVED

The subject action arose and was determined under the provisions of the Federal Employers' Liability Act, 45 U. S. C. § 51-60, which provides in relevant part:

> § 51. Liability of common carriers by railroad, in interstate or foreign commerce, for injuries to employees from negligence; definition of employees
>
> Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents or employees of such carrier or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.
>
> Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter.

Apr. 22, 1908, c. 149, § 1, 35 Stat. 65; Aug. 11, 1939, c. 685, § 1, 53 Stat. 1404.

§ 54. Assumption of risks of employment

In any action brought against any common carrier under or by virtue of any of the provisions of this chapter to recover damages for injuries to, or the death of, any of its employees, such employee shall not be held to have assumed the risks of his employment in any case where such injury or death resulted in whole or in part from the negligence of any of the officers, agents, or employees of such carrier; and no employee shall be held to have assumed the risks of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee.

Apr. 22, 1908, c. 149, § 4, 35 Stat. 66; Aug. 11, 1939, c. 685, § 1, 53 Stat. 1404.

STATEMENT OF THE CASE

A. Summary of Proceedings

This action was brought under the Federal Employers' Liability Act to recover damages for injuries sustained by the plaintiff while employed by the defendant. The case was tried in the United States District Court for the Eastern District of Pennsylvania before a jury, which returned a verdict in favor of the plaintiff in the amount of $15,000. The Court thereupon reduced the award to $3750 in accordance with the jury's finding of 75% contributory negligence, and judgment was entered upon the verdict. Plaintiff's Motion for New Trial was denied.

Plaintiff appealed from this judgment to the United States Court of Appeals for the Third Circuit, which affirmed the judgment without opinion and denied plaintiff's Petition for Rehearing.

B. Statement of Facts

The plaintiff was injured while operating a large machine known as a tie plugger. This was an old machine which constantly leaked oil from its fittings. The defendant was fully aware of this condition. On the day of the accident, plaintiff was operating the tie plugger machine when it began to spew oil. The plaintiff and the machine became covered with oil, and the oil ran down onto the roadbed. When the plaintiff stood up to attempt to repair the leak, he slipped on the oil and as he fell he struck the accelerator pedal, causing the machine to start moving. Plaintiff was dragged along the roadbed until he was able to free his leg from the pedal.

At the close of trial, plaintiff submitted to the court his Request for Instructions, which included several points on the provisions and application of the Federal Employers' Liability Act (Appendix E). The trial judge did

not read any of plaintiff's requests, but instead delivered a charge which covered such items as burden of proof, weight of the evidence, comparative negligence and damages (A12-A31). Following the charge, plaintiff's counsel informed the trial judge that he had not defined negligence, nor made any reference to the Federal Employers' Liability Act in his charge (A31). The judge acknowledged the oversight (A31), and subsequently explained to the jury the general meaning of negligence (A33-A34). However, no reference was made at all to the Federal Employers' Liability Act during this supplemental charge, and in response to the renewed objection by plaintiff's counsel (A34), the trial judge stated that he was not going to "burden the jury" (A35). The jury returned a verdict in favor of the plaintiff, but in response to special interrogatories, found the plaintiff 75% contributorily negligent.

Plaintiff appealed on the grounds that the trial court committed reversible error in refusing to charge the jury on the provisions of the Federal Employers' Liability Act and the law applicable to a case under the Act.

REASONS FOR GRANTING THE WRIT

This Honorable Court should grant a Writ of Certiorari because, on an important question of substantive law under the Federal Employers' Liability Act, the United States Court of Appeals for the Third Circuit rendered a decision in conflict with the decisions of other federal and state courts on the same matter.

The decision of the Court of Appeals affirming the trial court's action of refusing to instruct the jury on the relevant provisions of the Federal Employers' Liability Act is contrary to the general rule that where the law governing a case is expressed in a statute the court in its charge should use the language of the statute. *Terminal R. Ass'n. of St. Louis v. Howell*, 165 F. 2d 135, 140 (8th Cir., 1948). In the case at bar, not only did the trial judge refuse to charge the jury on the law applicable to a case under the Federal Employers' Liability Act, he refused to even mention the Act.

In *Howell*, the railroad challenged the propriety of instructing the jury in the language of the Federal Employers' Liability Act. The Court of Appeals for the Eighth Circuit approved such instructions, stating in support thereof that:

> One of the primary duties of the court is to expound the law to the jury and this is done by means of instructions. The basic law governing this case is that which the court in this instruction quoted to the jury. Even in criminal cases it is held as a general rule that where the law governing a case is expressed in a statute the court in its charge should use the language of the statute.
>
> • • •

> It would be strange indeed if it could be said to be error to lay down the law in the exact language of the statute upon which the action is based. 165 F. 2d at 139-140.

In *Terminal R. Ass'n. of St. Louis v. Fitzjohn*, 165 F. 2d 473 (8th Cir. 1948), the Eighth Circuit reaffirmed its holding on reciting the relevant provisions of the Federal Employers' Liability Act in a charge on the Act. The Court said:

> It is not error for a Court to briefly state to the jury the statutory law upon which an action is based and then to point out the specific provisions of the Act which are being invoked in the cause on trial. Instead of being confusing, it is enlightening to the jury to understand what the basic law is, and it further tends to put the plaintiff's charge of negligence in the case on trial upon a more dispassionate basis if the jury understands that the lawmakers did not exaggerate the seriousness of that particular charge of negligence by enacting a statute especially covering the situation there complained of. 165 F. 2d at 480.

The general rule of informing the jury that the action is governed by the Federal Employers' Liability Act and reciting the pertinent provisions of the Act has been followed by other federal courts and state courts. See *Schirra v. Delaware, L & W R. Co.*, 103 F. Supp. 812, 820 (M. D. Pa. 1952); *Atlantic Coast Line Railroad Company v. McDonald*, 103 Ga. App. 328, 119 S. E. 2d 356, 359 (1961). The model jury instructions for cases under the Federal Employers' Liability Act also incorporate the pro-

visions of the statute. Devit & Blackman, 3 *Federal Jury Practice and Instructions*, 3d Ed. § 94.01; et seq.

The Court of Appeals for the Third Circuit, by approving the charge given by the District Court in the instant case, has departed from the decisions outlined above.

The trial judge refused to give the substance of plaintiff's Request for Instruction No. 1 (A8-A9), which stated that:

> This action is brought by Andre Franks against National Railroad Passenger Corporation under and by virtue of an Act of Congress, known as the Federal Employers' Liability Act. The rights which this Act creates are federal rights protected by federal rather than local rules of law. The pertinent provisions of the Federal Employers' Liability Act read as follows:
>
> Every common carrier by railroad while engaging in commerce between any of the several States or Territories . . . shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce or, in case of death of such employee, to his or her personal representatives, for the benefit of the surviving widow . . . and children of such employee . . . for such injury or death . . . resulting in whole or in part from the negligence of any of the officers, agents or employees of such carrier, or *by reason of any defect or insufficiency, due to its negligence, in its* cars, engines, appliances, *machinery*, track, roadbed, works, boats, wharves, or other equipment (emphasis supplied).

It is the position of the plaintiff that in order for the jury to properly consider the issues involved in an action under the Federal Employers' Liability Act, the jury must

be apprised of the basic information contained in the above-quoted instruction. The instant case shows why it is so important to convey this information. The evidence proved that defendant provided the plaintiff with a machine that was so defective and worn that it was constantly leaking oil. Under these circumstances, defendant failed in its obligation under the Federal Employers' Liability Act to supply safe machinery. Accordingly, plaintiff was entitled to specific instructions on the provision of the Act imposing liability on the defendant for injuries resulting from defective machinery. The trial judge refused to give these instructions. The jury was never told that the defendant had a statutory obligation to supply safe machinery. In fact, they were never even told that a statute governed this case. In the absence of such instructions, the jury could not have understood what the obligation of the defendant was to the plaintiff, and the jury may have been led to erroneously conclude that there was no basis for plaintiff's theory of liability.

Specific instructions on the pertinent provisions of the Federal Employers' Liability Act are all the more important where, as here, the issue of contributory negligence is submitted to the jury. Under the rule of comparative negligence, the jury is entitled to consider all the circumstances which characterize the negligence of either party. *Sears v. Southern Pacific Co.*, 313 F. 2d 498, 501 (9th Cir., 1963). The jury here was not instructed on the law which characterized the negligence of the defendant, consequently the jury was given no basis for comparing the relative amount of fault of each party. Furthermore, the trial judge failed to charge the jury as requested by plaintiff (A9-A11) that assumption of risk is not a defense under the Federal Employers' Liability Act. 45 U. S. C. § 54. The facts of this case are a classic

example of assumption of risk. Plaintiff was doing nothing more than what his duties required him to do, that is, to operate the tie plugger machine despite the risk posed by the leaking oil. It was therefore necessary, in light of its decision to submit the issue of contributory negligence to the jury, that the trial court instruct the jury on the Act's provision regarding assumption of risk to dispel any false notions that plaintiff's use of the defective machine was contributory negligence.

The authorities are uniform that a party is entitled to specific instructions on his theory of the case. *Chicago & Northwestern Railway Company v. Rieger,* 326 F. 2d 329 (8th Cir., 1964); *Denny v. Montour R. Co.,* 101 F. Supp. 735 (W. D. Pa., 1951). In an action under the Federal Employers' Liability Act, this requires that reference be made to the provisions of the Act because it creates standards of negligence different from those at common law. The instructions must necessarily define liability to include a greater area than that at common law. *Hoyt v. Central Railroad,* 243 F. 2d 840, 843 (3rd Cir., 1957).

Since the Federal Employers' Liability Act has established a more protective principle for railroad employees than that of the common law, the judicial charge should employ and emphasize the language of the statute. See *Hausrath v. New York Central Railroad Company,* 401 F. 2d 634, 638 (6th Cir., 1968). This was not done in the case at bar. The District Court gave a general, abstract charge on the law of negligence and not once did the Court refer to the Federal Employers' Liability Act. This is contrary to the decisions of the federal and state courts cited herein and for this reason it is respectfully submitted that this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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